

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JAVIER ROSARIO,

Plaintiff,

v.

WESTERN REGIONAL OFF TRACK BETTING  
CORPORATION,

Defendant(s).

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COMPLAINT

Civ. No.:

**JURY TRIAL DEMANDED**

Plaintiff demands a jury to try all claims triable by a jury.

**PRELIMINARY INTRODUCTION**

1. This is an action against Defendant WESTERN REGIONAL OFF TRACK BETTING CORPORATION (“OTB”), for discrimination against Plaintiff JAVIER ROSARIO (“ROSARIO”), who after being diagnosed in March 2005, continues to suffer from Hodgkin’s Lymphoma, a rare form of cancer, and for retaliatory discharge in violation of the Americans with Disabilities Act 42 U.S.C. § 12101, *et seq.* (“ADA”) and the New York State Human Rights Law, Executive Law § 290 *et seq.* (“NYSHRL”).

**JURISDICTION AND VENUE**

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1331 and 1343, 42 U.S.C. § 2000 (e), 29 U.S.C. § 1331, 29 U.S.C. §§ 206 and 216; the Court also has supplemental jurisdiction pursuant to 28 U.S.C. 1367 to adjudicate Plaintiff’s claims under state law.
3. Venue is proper pursuant to 28 U.S.C. §1391

4. Plaintiff filed a verified complaint with the New York State Division of Human Rights (“NYSDHR”) on December 4<sup>th</sup>, 2006. On August 7<sup>th</sup>, 2007, the NYSDHR found PROBABLE CAUSE to believe that Rosario had been discriminated against in violation of the ADA and the NYSHRL. A Right to Sue Notice was issued by the Equal Employment Office on September 11<sup>th</sup>, 2008 and is annexed herein as Exhibit A. Less than ninety (90) days have elapsed since Rosario’s receipt of that notice and his subsequent filing of the original complaint in this matter.

### **PARTIES**

5. Rosario is an individual male who was at all times relevant herein a resident of the County of Monroe, State of New York.
6. Upon information and belief, Defendant is a corporation organized and operating under the laws of the State of New York and/or licensed to do business in the State of New York and is an employer for the purposes of application of the relevant statutes codes and laws set forth herein.

### **FACTS**

7. Rosario was hired by OTB in the year 2000 as a part time printer, and was promoted to a full time position six months later.
8. On April 14, 2001, Rosario was promoted to the position of “Lead Printer” and “Night Supervisor.”
9. Rosario was a satisfactory employee, and was otherwise qualified for his position.
10. In March of 2005, Rosario was diagnosed with Hodgkin’s Lymphoma, a rare form of cancer.

11. In or about March of 2005, Rosario provided OTB with a note from his physician indicating that he would have to be out on leave from work until November 1, 2005 due to the fact that he would be commencing chemotherapy and radiation treatment.
12. Rosario submitted the physician's note to Supervisor Mark Adams ("Supervisor Adams"), who assured Rosario that he did not have to worry about losing his job because he had a lot of sick and personal time saved up.
13. At no time, however, did OTB ever inform Rosario of his rights to take leave under the FMLA.
14. Rosario returned to work in October of 2005.
15. At the time he returned to work through the time he was terminated, Rosario was under the continuous treatment of a physician for cancer and receiving radiation treatment.
16. As a result of Rosario's medical condition and continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of permission of his immediate supervisor to receive personal calls on his cell phone from his family, friends and physician as he was still undergoing radiation treatment for his medical condition. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by defendant nor was Rosario ever verbally warned or written up for these actions.

17. As a result of his medical condition and his continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of short breaks to allow him to get fresh air and/or put water on his face as he was still undergoing radiation for his medical condition which caused, in part, nausea. During these short breaks, a co-worker would cover for Rosario. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by defendant nor was Rosario ever verbally warned or written up for these actions.
18. On March 29<sup>th</sup>, 2006 Rosario was called to a meeting with Vice President Patrick Murphy ("VP Murphy") and Supervisor Adams.
19. Prior to the meeting, Rosario overheard two co-workers state that "someone was going to rack up a large medical bill" due to his diagnosis of cancer and that OTB was going to try to fire him so that they would not be responsible for paying Rosario's medical bills.
20. At that meeting, Rosario was indeed informed by Vice President Murphy and Supervisor Adams that he was terminated.
21. The reasons given for Rosario's termination were constant telephone calls, frequent and extensive unauthorized absences, and serious disruption of the print shop operations.
22. As stated above, these absences were authorized by Supervisor Adams, that the telephone calls were from his doctor and made with Supervisor Adam's consent, and that the breaks that he took during work time were no longer than the breaks taken by similarly situated employees.

23. In fact, Plaintiff's requests for reasonable accommodations were authorized by Supervisor Adams and Plaintiff was never verbally warned or written up for exercising his reasonable accommodations.

24. Rosario was terminated because of his disability and not because of the pretextual reason given to him as the basis for his termination.

### **FIRST CAUSE OF ACTION**

#### **As And Against Defendant for Willful Violations of the FMLA**

25. Rosario repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs and incorporates the same as though fully set forth herein.

26. That the above acts were willful violations of the Family Medical Leave Act in that OTB has denied, restrained and interfered with Rosario's exercise of, attempt and ability to exercise any and all of his rights under the FMLA.

27. Rosario was prejudiced by this failure in that he was unable to take the leave to which he was entitled under the law.

28. Rosario is therefore entitled to recover damages as provided in 29 U.S.C. § 2617.

### **SECOND CAUSE OF ACTION**

#### **As and Against Defendant for Retaliation in Violation of the FMLA**

29. Rosario repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs and incorporates the same as though fully set forth herein.

30. Rosario engaged in protected activity when he took leave from work for an FMLA qualifying condition because of his diagnosis and treatment of Hodgkin's Lymphoma. In March of 2005, Rosario was diagnosed with Hodgkin's Lymphoma, a rare form of cancer. In or about March of 2005, Rosario provided OTB with a note from his physician indicating that he would have to be out on leave from work until November 1, 2005 due to the fact that he would be commencing chemotherapy and radiation treatment. Rosario submitted the physician's note to Supervisor Mark Adams ("Supervisor Adams"), who assured Rosario that he did not have to worry about losing his job because he had a lot of sick and personal time saved up. Thus, Rosario informed OTB of his need for leave from a medical condition which was FMLA qualifying. Therefore, Rosario's absences from work were FMLA qualifying.
31. Upon returning to work Rosario requested, and was granted by Supervisor Adams, the ability to be absent from work and to take breaks due to his medical condition and the treatment thereof.
32. Rosario was wrongfully terminated about six (6) months after returning to work.
33. As a direct and proximate result of OTB's willful, knowing and intentional discrimination against him, Rosario has suffered and will continue to suffer severe mental and emotional anguish, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Rosario is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.

34. OTB's conduct as described herein was malicious and oppressive, and done with a conscious disregard of Rosario's rights. The acts were performed with the knowledge of an employers' economic power over its employees. OTB ratified the unlawful conduct of its employees in this action. Consequently, Rosario is entitled to exemplary damages from all defendants.

### **THIRD CAUSE OF ACTION**

#### **As And Against Defendant for Violations of the ADA**

35. Rosario repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs and incorporates the same as though fully set forth herein.
36. As a result of Rosario's medical condition and continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of permission of his immediate supervisor to receive personal calls on his cell phone from his family, friends and physician as he was still undergoing radiation treatment for his medical condition. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. As a result of his medical condition and his continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of short breaks to allow him to get fresh air and/or put water on his face as he was still undergoing radiation for his medical condition which caused, in part, nausea. During these short breaks, a co-worker would cover for Rosario. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. On March 29<sup>th</sup>, 2006 Rosario was called to a meeting with Vice President Patrick Murphy ("VP Murphy") and Supervisor Adams. Prior to the meeting, Rosario overheard two co-workers state

that “someone was going to rack up a large medical bill” due to his diagnosis of cancer and that OTB was going to try to fire him so that they would not be responsible for paying Rosario’s medical bills. At that meeting, Rosario was indeed informed by Vice President Murphy and Supervisor Adams that he was terminated. The reasons given for Rosario’s termination were constant telephone calls, frequent and extensive unauthorized absences, and serious disruption of the print shop operations. As stated above, these absences were authorized by Supervisor Adams, that the telephone calls were from his doctor and made with Supervisor Adam’s consent, and that the breaks that he took during work time were no longer than the breaks taken by similarly situated employees. In fact, Rosario’s requests for reasonable accommodations were authorized by Supervisor Adams and Rosario was never verbally warned or written up for exercising his reasonable accommodations. Rosario’s termination was the result of OTB denying him reasonable accommodations which would allow him to fulfill the essential functions of his job.

37. Upon information and belief, OTB perceived Rosario as being disabled and refused to allow him to continue his work with OTB on that basis.
38. OTB’s refusal to provide or allow reasonable accommodations to Rosario’s known disability and/or perceived disability such that he could continue to fulfill the essential functions of his job and its discharge of him because of his disability, constitutes discrimination in violation of the ADA.



39. OTB's refusal to engage in the interactive process with the Rosario, its refusal to meaningfully explore reasonable accommodations for his disability and/or perceived disability, and OTB's discharge of Rosario constitutes gross, wanton, reckless and/or intentional violation of his rights under the ADA, entitling him to punitive damages.
40. OTB violated the ADA by failing to adequately supervise, control, discipline, and/or otherwise penalize the conduct, acts and failures to act of OTB as described above when they illegally and unlawfully perceived that Rosario could not perform the essential functions of his job due to his medical condition, and failed to reasonably accommodate his disability.
41. As a direct and proximate result of OTB's willful, knowing and intentional discrimination against him, Rosario has suffered and will continue to suffer severe mental and emotional anguish, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Rosario is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.
42. As a further and proximate result of the OTB's violations of the ADA, Rosario has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with OTB, and has thereby incurred and will continue to incur, legal fees and costs, the full nature and extent of which are presently unknown to the Rosario. Accordingly, Rosario requests that attorney fees be awarded.

43. OTB's conduct as described herein was malicious and oppressive, and done with a conscious disregard of Rosario's rights. The acts were performed with the knowledge of an employers' economic power over its employees. OTB ratified the unlawful conduct of its employees in this action. Consequently, Rosario is entitled to exemplary damages from all defendants.

#### **FOURTH CAUSE OF ACTION**

##### **As and Against Defendant for Retaliation in Violation of the ADA**

44. Rosario repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs and incorporates the same as though fully set forth herein.
45. As a result of Rosario's medical condition and continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of permission of his immediate supervisor to receive personal calls on his cell phone from his family, friends and physician as he was still undergoing radiation treatment for his medical condition. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. As a result of his medical condition and his continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of short breaks to allow him to get fresh air and/or put water on his face as he was still undergoing radiation for his medical condition which caused, in part, nausea. During these short breaks, a co-worker would cover for Rosario. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. On March 29<sup>th</sup>, 2006 Rosario was called to a meeting with Vice President Patrick Murphy ("VP Murphy") and Supervisor Adams. Prior to the meeting, Rosario overheard two co-workers state that "someone was going to rack up a large medical bill" due to his diagnosis of cancer and that OTB was going to try to fire him so that they would not be

responsible for paying Rosario's medical bills. At that meeting, Rosario was indeed informed by Vice President Murphy and Supervisor Adams that he was terminated. The reasons given for Rosario's termination were constant telephone calls, frequent and extensive unauthorized absences, and serious disruption of the print shop operations. As stated above, these absences were authorized by Supervisor Adams, that the telephone calls were from his doctor and made with Supervisor Adam's consent, and that the breaks that he took during work time were no longer than the breaks taken by similarly situated employees. In fact, Rosario's requests for reasonable accommodations were authorized by Supervisor Adams and Rosario was never verbally warned or written up for exercising his reasonable accommodations. In addition to denying Rosario reasonable accommodations which would allow him to fulfill the essential functions of his job, Rosario's termination was also the result of Plaintiff requesting his need for accommodations and defendant's retaliation in the form of refusing to accommodate Plaintiff's known needs.

46. Upon information and belief, Plaintiff was and/or OTB perceived Rosario to be disabled and refused to allow him to continue his work with OTB on that basis.

47. OTB's refusal to provide or allow reasonable accommodations to Rosario's known disability and/or perceived disability such that he could continue to fulfill the essential functions of his job and its discharge of him because of his disability, constitutes retaliation in violation of the ADA.

48. OTB's refusal to engage in the interactive process with the Rosario, its refusal to meaningfully explore reasonable accommodations for his disability and/or perceived disability, and OTB's discharge of Rosario constitutes gross, wanton, reckless and/or intentional violation of his rights under the ADA, entitling him to punitive damages.
49. OTB violated the ADA by failing to adequately supervise, control, discipline, and/or otherwise penalize the conduct, acts and failures to act of OTB as described above when they illegally and unlawfully perceived that Rosario could not perform the essential functions of his job due to his medical condition, and failed to reasonably accommodate his disability.
50. As a direct and proximate result of OTB's willful, knowing and intentional discrimination and retaliation against him, Rosario has suffered and will continue to suffer severe mental and emotional anguish, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Rosario is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.
51. As a further and proximate result of the OTB's violations of the ADA, Rosario has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with OTB, and has thereby incurred and will continue to incur, legal fees and costs, the full nature and extent of which are presently unknown to the Rosario. Accordingly, Rosario requests that attorney fees be awarded.

52. OTB's conduct as described herein was malicious and oppressive, and done with a conscious disregard of Rosario's rights. The acts were performed with the knowledge of an employers' economic power over its employees. OTB ratified the unlawful conduct of its employees in this action. Consequently, Rosario is entitled to exemplary damages from all defendants.

### **FIFTH CAUSE OF ACTION**

#### **As and Against Defendant for Retaliation in Violation of the NYSHRL**

53. Rosario repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs and incorporates the same as though fully set forth herein.
54. As a result of Rosario's medical condition and continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of permission of his immediate supervisor to receive personal calls on his cell phone from his family, friends and physician as he was still undergoing radiation treatment for his medical condition. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. As a result of his medical condition and his continuous medical treatment for the same, Rosario requested a reasonable accommodation in the form of short breaks to allow him to get fresh air and/or put water on his face as he was still undergoing radiation for his medical condition which caused, in part, nausea. During these short breaks, a co-worker would cover for Rosario. Supervisor Adams gave Rosario permission to do so. Further, this permission was never revoked by OTB nor was Rosario ever verbally warned or written up for these actions. On March 29<sup>th</sup>, 2006 Rosario was called to a meeting with Vice President Patrick Murphy ("VP Murphy") and Supervisor Adams. Prior to the meeting, Rosario overheard two co-workers state that "someone was going to rack up a large medical bill" due to his diagnosis of

cancer and that OTB was going to try to fire him so that they would not be responsible for paying Rosario's medical bills. At that meeting, Rosario was indeed informed by Vice President Murphy and Supervisor Adams that he was terminated. The reasons given for Rosario's termination were constant telephone calls, frequent and extensive unauthorized absences, and serious disruption of the print shop operations. As stated above, these absences were authorized by Supervisor Adams, that the telephone calls were from his doctor and made with Supervisor Adam's consent, and that the breaks that he took during work time were no longer than the breaks taken by similarly situated employees. In fact, Rosario's requests for reasonable accommodations were authorized by Supervisor Adams and Rosario was never verbally warned or written up for exercising his reasonable accommodations. In addition to denying Rosario reasonable accommodations which would allow him to fulfill the essential functions of his job, Rosario's termination was also the result of Plaintiff requesting his need for accommodations and defendant's retaliation in the form of refusing to accommodate Plaintiff's known needs.

55. Upon information and belief, Plaintiff was and/or OTB perceived Rosario to be disabled and refused to allow him to continue his work with OTB on that basis.

56. OTB's refusal to provide or allow reasonable accommodations to Rosario's known disability and/or perceived disability such that he could continue to fulfill the essential functions of his job and its discharge of him because of his disability, constitutes retaliation in violation of the NYSHRL.

57. OTB's refusal to engage in the interactive process with the Rosario, its refusal to meaningfully explore reasonable accommodations for his disability and/or perceived disability, and OTB's discharge of Rosario constitutes gross, wanton, reckless and/or intentional violation of his rights under the NYSHRL, entitling him to punitive damages.
58. OTB violated the NYSHRL by failing to adequately supervise, control, discipline, and/or otherwise penalize the conduct, acts and failures to act of OTB as described above when they illegally and unlawfully perceived that Rosario could not perform the essential functions of his job due to his medical condition, and failed to reasonably accommodate his disability.
59. As a direct and proximate result of OTB's willful, knowing and intentional discrimination and retaliation against him, Rosario has suffered and will continue to suffer severe mental and emotional anguish, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Rosario is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.
60. OTB's conduct as described herein was malicious and oppressive, and done with a conscious disregard of Rosario's rights. The acts were performed with the knowledge of an employers' economic power over its employees. OTB ratified the unlawful conduct of its employees in this action. Consequently, Rosario is entitled to exemplary damages from all defendants.

**WHEREFORE,** Plaintiff respectfully requests the Court to enter judgment as to each cause of action in his favor as well as any and all other relief the Court deems just and proper.

Dated: December 1, 2008  
Rochester, New York

Respectfully Submitted,

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Christina A. Agola, Esq.  
Christina A. Agola  
Attorneys and Counselors at Law PLLC  
2100 First Federal Plaza  
Rochester, New York 14614  
585.262.3320 (phone)  
585.262.2641 (fax)  
[caaesq@rochester.rr.com](mailto:caaesq@rochester.rr.com)



**EXHIBIT A**

## U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

## NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: **Javier Rosario**  
3389 Midway Road  
Albion, NY 14411

From: **New York District Office**  
33 Whitehall Street  
5th Floor  
New York, NY 10004

☐

On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

**16G-2007-00575****John B. Douglass,**  
Supervisory Investigator**(212) 336-3765***(See also the additional information enclosed with this form.)*

## NOTICE TO THE PERSON AGGRIEVED:

**Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA):** This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA **must be filed in a federal or state court WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

☒

More than 180 days have passed since the filing of this charge.

☐

Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.

☒

The EEOC is terminating its processing of this charge.

☐

The EEOC will continue to process this charge.

**Age Discrimination in Employment Act (ADEA):** You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

☐The EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS** of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.☐

The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

**Equal Pay Act (EPA):** You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

  
**Spencer H. Lewis, Jr.,**  
Director**SEP 11 2008**

(Date Mailed)

Enclosures(s)

cc: **WESTERN REGIONAL OFF-TRACK BETTING**  
8315 Park Road  
Batavia, NY 14020

**CHRISTINA A. AGOLA**  
Attorneys and Counselors at Law  
730 First Federal Plaza, 28 East Main Street  
Rochester, NY 14614